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Trends in Environmental Liability Judgments against Small Enterprises and the Apparent Ramifications for Federal and State Regulatory Agencies

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This report is part of the National Network for Environmental Management Studies conducted under the auspices of the Office of Cooperative Environmental Management - U. S. Environmental Protection Agency. It identifies the trends in environmental liability judgements against small enterprises and the apparent ramifications for Federal and state regulatory agencies. The remedies available to non-governmental parties when small businesses cause damage to the environment are examined. Use of the citizen suit provision of the Clean Water Act is discussed in detail, and similar provisions of other environmental statutes are discussed, as well as common law actions.

Relief under citizen suit provisions generally consists of injunctions, civil penalties, and recovery of costs. Many cases have been litigated using the CWA, but few using other statutes. CWA allows plaintiffs to obtain information regarding permit violations from the polluting business and use that information as evidence in subsequent proceedings. It is much more difficult for non-governmental parties to sue under other environmental legislation. Most citizen suits have been brought by "environmental groups" and in some geographic areas there have been many suits filed. The environmental groups almost always win, some of the suits have resulted in significant improvements in some areas. While these actions may provide relief for government agencies in some places, most agencies would see little if any reduction in their work load. (Occasionally, the government must monitor the citizen suits closely, which might actually increase their work load.)

Most cases against small businesses are unreported, but there does not appear to be any difference in treatment based on the size of the offending business.

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FINAL REPORT

Question 6105: What trends can be identified in environmental liability judgments against small enterprises and what are the apparent ramifications for Federal and state regulatory agencies?

Submitted to: Office of Policy, Planning and Evaluation

September 22, 1988

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TABLE OF CONTENTS

QUESTION 1

BRIEF ANSWER 1

PROCEDURES 2

CLEAN WATER ACT 3

STANDING 4

DILIGENT PROSECUTION 4

NOTICE 6

CONTINUING VIOLATIONS 7

UNRESOLVED QUESTIONS IN THE WAKE OF GWALTNEY 8

Where to draw the line? 8

Mootness 9

PLAINTIFFS 10

TYPES OF VIOLATIONS 11

TYPES OF RELIEF AVAILABLE 12

Injunction 12

Civil Penalties 12

Recovery of Costs 13

OTHER FEDERAL STATUTES 14

STANDING 15

DILIGENT PROSECUTION 15

NOTICE 16

CONTINUING VIOLATIONS 17

CLEAN AIR ACT 17

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT 19

RESOURCE CONSERVATION AND RECOVERY ACT 20

COMMON LAW ACTIONS 20

TYPES OF ACTIONABLE HARMS 21

REMEDIES AVAILABLE 25

NUMBERS 25

EFFECTIVENESS 26

TRENDS 28

RAMIFICATIONS 32

QUESTION: WHAT TRENDS CAN BE IDENTIFIED IN ENVIRONMENTAL LIABILITY JUDGMENTS AGAINST SMALL ENTERPRISES AND WHAT ARE THE APPARENT RAMIFICATIONS FOR FEDERAL AND STATE REGULATORY AGENCIES?

BRIEF ANSWER

Citizen suits are available under all the major federal environmental statutes. By far the most commonly used provisions are those found in the Clean Water Act. Because of the nature of the Act's requirements, it is relatively easy for plaintiffs to get the evidence needed to win a case. Other statutes lack these characteristics, and subsequently cannot be expected to be as heavily used. Relief may be available in the form of injunctions, civil penalties, and recovery of the costs of litigation.

The Supreme Court has said that federal common law has been preempted by the environmental statutes, but state common law actions are still available. Recently, courts have enlarged the types of relief available to plaintiffs who have suffered personal injury. This, along with stricter control of hazardous waste management, has the potential to greatly increase the amount of compensation awarded. Common law actions can be effective against any form of pollution that can become a nuisance (or trespass, etc.), and relief can be in the form of injunctions and/or monetary damages.

A recent Supreme Court decision interpreting the Clean Water Act has had both settling and unsettling effects on the law, but it is too early to tell what difference it will make in the practice of the law.

The few reported cases against small business do not suggest any trends other than those that apply to polluters in general.

Citizen suits can be of genuine assistance to state and federal agencies, but in most areas of the country the agencies are on their own. Even where citizens' groups are active, they are limited to actions against polluters of water.

PROCEDURES

As the assigned topic evolved over the course of the summer, it came to focus on suits brought by non-governmental plaintiffs against small businesses which had caused harm to the physical environment. Other types of cases were studied and are included to clarify the law in general. The statutes thought most likely to have significant case law in this area were the Clean Water Act (CWA),[1] Clean Air Act (CAA),[2] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[3] and Resource Conservation and Recovery Act (RCRA).[4] Common law actions, such as nuisance and trespass, are also considered.

From EPA's Small Business Ombudsman I learned that the basic definition of a small business concern is one with 50 or fewer employees, although there are numerous exceptions. I determined to just use the general rule and ignore all the exceptions for the sake of convenience.

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1. 33 U.S.C. § 1251 et. seq.

2. 42 U.S.C. § 7401 et. seq.

3. 42 U.S.C. § 9601 et. seq.

4. 42 U.S.C. § 6901 et. seq.

I found cases by Shepardizing the citizen suit provisions of the various statutes, as well as in environmental law reporters and by contacting attorneys who were listed as advocates in the reported cases. The majority of the type of cases I was looking for appear to go unreported.[5]

The assumption is being made that the readers of this paper are familiar with the provisions of the relevant legislation. Citizen suits under CWA will be discussed in detail and will then serve as the reference point for treatment of the other statutes.

CLEAN WATER ACT

Generally speaking, when plaintiffs sue for violations of the Clean Water Act they are successful. Since the statute imposes strict liability,[6] the plaintiff only has to show that he is properly in court, present evidence of a violation, and move for summary judgment on the defendant's liability. Violations may consist of exceeding NPDES permit limitations, discharging without a permit, or failing to report discharges as required.

Organizations that are experienced in these litigation techniques have an extremely high degree of success. Less experienced plaintiffs have occasionally been thrown out of court

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5. Miller, Private Enforcement of Federal Pollution Control Laws, Part I, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10309, 13 (Oct. 1983).

6. Ward v. Coleman, 423 F. Supp. 1352, 57 (W.D. Okla. 1976), rev'd, 598 F.2d 1187 (10th Cir. 1979), rev'd sub nom. United States v. Ward, 448 U.S. 242 (1980) (Strict liability provisions of CWA are "in order to inspire `performance rather than excuses,'" quoting from United States v. White Fuel Corp., 498 F.2d 619, 623 (1st Cir. 1974).

due to technicalities (a.k.a. the defendant's constitutional rights). The most frequent stumbling blocks for plaintiffs have been their lack of standing, diligent prosecution by the state or federal government, failure to give adequate notice, or failure to allege continuing violations.

STANDING

Standing is an easy requirement for citizen's groups to meet since the Supreme Court showed the way in Sierra Club v. Morton.[7] The Morton test requires only that a group allege and be prepared to prove that some of its members have suffered an "injury in fact," if but to their aesthetic, conservational, or recreational values.[8] With the benevolent interpretations being given plaintiff's claims by the courts,[9] there is little reason short of malpractice for a case to be dismissed for lack of standing.

DILIGENT PROSECUTION

In Connecticut Fund for the Environment v. Contract Plating Co.,[10] CFE was trying to get the court to define "diligently prosecuting", hoping that the court would equate it with

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7. 405 U.S. 727 (1972).

8. id. at 738.

9. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 89 n.14 (1973) ("an identifiable trifle is enough for standing," quoting Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 13 (1968), Student Public Interest Research Group of New Jersey, Inc. v. Georgia Pacific Corp., 615 F. Supp. 1419, 24 (D.N.J. 1985) (using same language).

10. 631 F. Supp. 1291 (D. Conn. 1986).

effectiveness.[11] The court sidestepped that question, however, and ruled that there is a presumption of diligence if the state is doing anything, and in the absence of "persuasive evidence" to the contrary, that assumption will remain undisturbed.[12]

While there has been no other light shed on that question, there appears to be a consensus that subject matter jurisdiction will not be defeated by a previous administrative proceeding,[13] nor by a subsequently-filed judicial action.[14] Therefore, it is an easy trap to avoid and should be of little consequence in future litigation.

Polluting industries should not rest easier, however, just because EPA or the state decides to ignore them. Courts agree that EPA's decision to not prosecute a CWA violation does not foreclose the possibility of a citizen suit.[15] EPA has no

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11. Telephone interview with Kathryn Robinson, Connecticut Fund for the Environment Aug. 10, 1988.

12. Contract Plating, 631 F. Supp. at 1293.

13. Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc., 759 F.2d 1131 (3rd Cir. 1985), Sierra Club v. SCM Corp., 747 F.2d 99 (2d Cir. 1984), Connecticut Fund for the Environment v. L & W Industries, Inc., 631 F. Supp. 1289 (D. Conn. 1986).

14. Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985), Connecticut Fund for the Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397 (D. Conn. 1987).

15. Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985), Bethlehem Steel Corp. v Train, 544 F.2d 657, 60 (3rd Cir. 1976), Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 832 (D. Alaska 1984).

authority to block a suit even if they believe the suit should not go forward.[16]

NOTICE

The notice requirements are spelled our clearly in the statute, demanding that the plaintiff give the EPA, the state, and the defendant 60 days notice before filing an action in court.[17] Some courts have interpreted this requirement as being jurisdictional in nature, and thus have dismissed suits for failure to comply.[18] Others have ruled that substantial compliance is enough,[19] while one has ruled that the normal delays in the judicial system had the effect of giving the parties adequate notice.[20]

The Supreme Court recently discussed its views of this requirement as it relates to the question of suits for wholly past violations, in Gwaltney of Smithfield, Ltd. v. Chesapeake

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16. Bethlehem Steel Corp. v Train, 544 F.2d 657, 60 (3rd Cir. 1976).

17. 33 U.S.C. § 1365(b).

18. Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985), Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton, 644 F.2d 995 (2d Cir. 1981), Oregon Natural Resources Council, Inc. v. U.S. Forest Service, 659 F. Supp. 1441 (D. Or. 1987), Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 118 (D.C. Alaska 1984).

19. Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987), Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Laboratories, 617 F. Supp. 1190 (D.C.N.J. 1985).

20. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 43 (3rd Cir. 1980), cert. denied, 449 U.S. 1096 (1981).

Bay Foundation, Inc.[21] Justice Marshall hints that he thinks the statute should be read strictly,[22] but since it was not an issue in Gwaltney, his comments are not binding on lower courts. There may now be a shift towards requiring adherence to the letter, and not just the spirit, of the law. However, it is just too soon to tell what effect, if any, this decision will have on courts' interpretations of the notice requirements.

CONTINUING VIOLATIONS

Until the Court decided Gwaltney, there had been a three-way split among the circuit courts on the issue of whether suits could be brought where only past violations were being alleged. The seventh circuit was first to rule on the question and rejected the proposition outright, saying that the defendant's compliance defeated subject matter jurisdiction.[23] The fifth circuit followed this view when they were first presented with the issue.[24] In the case which eventually went to the Supreme Court for review, the fourth circuit upheld the denial of Gwaltney's motion to dismiss, when, after notice was given but before the suit was filed, Gwaltney took the actions necessary to

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21. 108 S. Ct. 376 (1987).

22. Id., at 382-83.

23. City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), cert. denied 444 U.S. 1025 (1980).

24. Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985).

come into compliance.[25] The first circuit also took a shot at the question and landed between the two extremes, reading the phrase "is in violation" to include continuing or intermittent violations.[26]

The Court in Gwaltney said that relief (civil penalties) may be granted for past violations, but only if the plaintiff makes a good-faith allegation of continuous or intermittent violations that are likely to continue in the future.[27] While the "past violations" question has now allegedly been answered, other questions remain in the wake of what one commentator calls "the citizen suit enforcement case of the decade, if not of the century."[28]

UNRESOLVED QUESTIONS IN THE WAKE OF GWALTNEY

Where to draw the line?

The Court's opinion in Gwaltney appears to suffer from the same malady that the Court ascribes to the Clean Water Act itself, viz. it is not a case where the author's "limpid prose puts an end to all dispute."[29] Indeed, there are learned people

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25. Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir. 1986) vacated 108 S. Ct. 376 (1987).

26. Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089 (1st Cir. 1986).

27. Gwaltney, 108 S. Ct. at 381.

28. Miller, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.: Invitation to the Dance of Litigation, [18 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10098, 10098 (Mar. 1988).

29. Gwaltney, 108 S. Ct. at 381.

who think the Court has outdone Congress and made the act less clear than it was before.30

While the Court did not likely intend this result, it raises questions which did not previously require consideration, such as

> What is the likelihood of the continuance or recurrence of a past violation? Was there a sufficient likelihood of continuance or recurrence on the date the complaint was filed to support a good-faith allegation of continuance or recurrence? What are intermittent violations? . . . [H]ow much time can pass between them before they lose their "intermittent" character?"31

If 60 days notice must be given to the defendant before suit may be filed, are not all alleged violations going to be past - indeed, may violations be alleged which are not past violations?32

Mootness

The Court's discussion of mootness suggests that if the defendant comes into compliance during the course of the judicial proceedings, he may be able to get the case dismissed as being moot, if he can prove to the court's satisfaction that the

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30. Miller, supra note 28, at 10098, 10104. Since "people" is plural, one might conclude that the author includes himself in this category.

31. Miller, supra note 28, at 10104.

32. The Court's philosophy would allow defendants who prolong litigation until they comply to get a windfall - they get to keep the economic rewards for their past non-compliance regardless of how flagrant their violations were or the ease with which they could have been corrected. Indeed, this thinking would appear to reward those for whom compliance is only a step away - they can procrastinate until the last minute and then fix the problem quickly and avoid penalties. It also probably conclicts with Congressional intent, given that in 1984 that body amended RCRA to allow citizen suits for past violations of RCRA.

violation is not likely to occur again.[33] This would seem to inspire defendants to resort to dilatory tactics whenever the opportunity presents itself.

PLAINTIFFS

The majority of the NPDES permit violation cases have been filed by those representing "environmental groups," but the average citizen also stands an excellent chance of victory if he has competent representation. Indeed, the standing issue would seem harder to challenge against a neighbor of the polluter than a national organization, and assuming proof of the violation exists and the remaining Gwaltney issues aren't a problem, there would appear to be little chance of (or reason for) losing. As discussed earlier, however, defendants may now be encouraged to use dilatory tactics to the extreme, in hopes of getting into compliance before the trial ends, which could make things difficult for plaintiffs with shallow pockets.

Some courts have appeared eager to let citizens get involved, assuming that this is what Congress intended by passing the citizen suit provisions in the CWA and other environmental legislation.[34] Consequently, they have attempted to lower the stumbling blocks when they think it is appropriate.[35] With a

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33. Gwaltney, 108 S. Ct. at 386.

34. Student Public Interest Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc., 759 F.2d 1131 (3rd Cir. 1985), Friends of the Earth v. Carey, 535 F.2d 165, 172-73 (2d Cir. 1976).

35. i.e., by allowing suits for wholly past violations, "substantial compliance" with notice requirements, etc..

fair number of court decisions to point out the possible weak points in a suit, the percentage of plaintiff victories will likely increase[36] (unless they get tripped up by debris from Gwaltney).

TYPES OF VIOLATIONS

While the great majority of citizen suits are for alleged violations of NPDES permits, there have also been actions for discharging without a permit[37] or failing to comply with an order (i.e. contruction or compliance schedule) of a state or the EPA.[38] Failing to file the reports as required is also considered a violation of the permit.[39][40]

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36. Terris, Private Watchdogs: Internal Auditing and External Enforcement--Three Perspectives, A. Environmentalists' Citizen Suits, [17 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10254, 57 (July 1987).

37. Sierra Club v. Abston Construction Co., Inc., 620 F.2d 41 (5th Cir. 1980), United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979), O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (E.D. Penn. 1981).

38. Mumford Cove Association, Inc. v. Town of Groton, 640 F. Supp. 392 (D. Conn. 1986), Locust Lane v. Swatara Township Authority, 636 F. Supp. 534 (M.D. Pa. 1986), O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 659 (E.D. Penn. 1981).

39. Menzel v. County Utilities Corp., 712 F.2d 91 (4th Cir. 1983), Sierra Club v. Simkins Industries, Inc., 617 F. Supp. 1120 (D. Md. 1985).

40. Citizen suits are also allowed against the Administrator when he fails to perform a mandatory duty. Several suits have been brought attempting to force EPA to take action against alleged violators. The growing majority of courts have ruled that the duties to investigate or take enforcement action are discretionary, and not a proper subject for a citizen suit. Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987), reversing 646 F. Supp. 741 (W.D. Mo. (1986), Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977), Contra Green v. Costle, 577 F. Supp. 1225 (W.D. Tenn. 1983) (once EPA finds a party in violation, only discretion

Most suits charging violations of NPDES permit limitations use the defendant's own discharge monitoring reports (DMR's) as the proof of liability, which has been approved by the Supreme Court.[41]

TYPES OF RELIEF AVAILABLE

According to the attorneys I spoke with, the goal of most citizen suits is to get (1)an injunction to stop the pollution, (2)civil penalties, and (3)recovery of costs.

Injunction

An injunction (or consent order) follows naturally after the granting of a motion for summary judgment on the issue of liability. Any future violations of this order will likely be met with additional legal actions by the government or citizens.

Civil Penalties

Civil penalties were recently increased by Congress to a maximum of $25,000 per day of violation.[42] In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any

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is in choosing a method of enforcement).

41. E.g., United States v. Ward, 448 U.S. 242 (1980) (polluters' admission of guilt may be used to establish liability for civil, but not criminal, proceedings), But cf. Friends of the Earth v. Facet Enterprises, Inc., 618 F. Supp. 532, 36 (W.D.N.Y. 1984) (DMR's not sufficient for summary judgment because of "convincing arguments why many of the alleged violations should not actually constitute violations [e.g. typographical mistakes in the DMR's]").

42. 33 U.S.C. § 1319(d).

good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.[43][44]

Criminal penalties have also been increased by Congress,[45] to a maximum of $25,000/day for negligently violating,[46] or up to $50,000/day for knowingly violating the provisions of the act.[47] A third category was recently added, subjecting those who knowingly endanger the safety or health of others to fines of up to $250,000 and 15 years in prison for individuals, or up to $1,000,000 for organizations.[48]

Recovery of Costs

An attorney whose firm does a lot of work for a public interest group told me that her firm relies solely on recoveries

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43. Id., but see O'Leary v. Moyer's Landfill, 523 F. Supp. 659 (E.D. Pa. 1981), ("those sums are better spent accomplishing the required remedial measures").

44. The tenor of the Gwaltney opinion seems to ignore that part of the Court's decision in Tull v. United States, 107 S. Ct. 831 (1987), which states that district courts are to "exact[] punishment", and "consider the need for retribution and deterrence, in addition to restitution" when they impose civil penalties (although, since this was not a citizen suit case, it could be argued that the Gwaltney Court simply did not want citizens deciding who was going to be punished).

45. In addition to raising the stakes in both civil and criminal actions, Congress created a new category - administrative penalties, under which the Administrator has authority to fine violators up to $125,000. 33 U.S.C. 1319(g).

46. 33 U.S.C. § 1319(c)(1).

47. 33 U.S.C. § 1319(c)(2).

48. 33 U.S.C. § 1319(c)(3).

from defendants to pay their expenses, and they don't charge the public interest group if they lose.[49] While some in the business sector see recovery of costs as the incentive behind many of the suits which have been filed, another attorney with this same firm had this response. "Contrary to popular belief, the attorney's fee provisions are not nearly adequate to encourage people to bring suits - not if they want to eat, at least."[50] Speaking in 1987, he said that during the last three years his firm had invested more than one million dollars in these suits and had recovered less than $50,000. "There are not many private law firms on the environmental side who would be ready to carry almost $1,000,000 worth of billing for three years. We hope for good results in the future, but there is no certainty."[51]

The third circuit provided what he would consider a "good result" earlier this year when it ruled that a law firm which normally bills less than the market rates may calculate their fees in a recovery action at the community market rates.[52]

OTHER FEDERAL STATUTES

A plaintiff suing a polluter under the CAA, CERCLA, or RCRA for the most part has the same obstacles to overcome as he does

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49. Telephone interview with Carolyn Travlik, Terris, Edgecombe, Hecker & Wayne Aug. 10, 1988.

50. Terris, supra note 36, at 10255.

51. Id.

52. SPIRG of New Jersey, Inc. v. AT&T Bell Laboratories, 842 F.2d at 1436.

suing under the CWA, and then some. These obstacles will be discussed as they apply to the other federal statutes in general, and then each statute will be discussed in more detail.

STANDING

The standard for standing is the same under all the environmental statutes - if the plaintiff fails to allege any "injury in fact", the case will be dismissed.[53] No cases were found where standing was challenged in a CERCLA action, the possible reasons for which will be discussed later. In a RCRA case, an owner of land adjacent to a poorly managed landfill was found to have suffered the requisite injury when his land was afflicted with birds and noxious odors.[54]

DILIGENT PROSECUTION

The bar to citizen-sponsored litigation when the state or EPA has commenced enforcement activity in court has been treated the same under the CAA as under the CWA. Here again, administrative proceedings will not prevent a citizen suit from going forward.[55] The comparable subsection of CERCLA is worded differently and will be discussed later. No cases interpreting RCRA on this point were found, but since the wording is identical

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53. Kaiser Cement Corp v. San Diego Air Pollution Control District, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20783 (S.D. Cal. June 7, 1982).

54. No Damaging or Unsightly Municipal Pollution, Inc. v. King County, 16 Envtl. L. Rep. (Envtl. L. Inst.) 21016 (W.D. Wash. Mar. 26, 1986).

55. Maryland Waste Coalition v. SCM Corp., 616 F. Supp. 1474 (D. Md. 1985) (interpreting the Clean Air Act).

to the CWA and the CAA, it would seem safe to assume that courts would interpret RCRA in the same way.

NOTICE

With other statutes, as under the CWA, courts are divided on the question of whether Congress really meant it when it required 60 days notice to the defendant and the government before suit could be filed. In Reeger v. Mill Service, Inc.,[56] which involved the CAA, CWA, and RCRA, as well as other non-federal causes of action, the district court dismissed all the federal statutory charges after quoting an oft-forgotten passage from a recent Supreme Court case. "Plaintiffs invoking these [citizen suit] provisions first must comply with specified procedures--which respondents here ignored--including in most cases 60 days' prior notice to potential defendants."[57]

While the Supreme Court may have indicated its thinking on the subject,[58] the strict interpretation philosophy is far from universally accepted. Eleven district courts struggled with the issue under CERCLA, splitting with five holding that notice is required and six holding that it is not.[59] "Of the seven circuits that have considered this issue [under RCRA], three have

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56. 593 F. Supp. 360 (W.D. Penn. 1984).

57. id., at 362, quoting Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1, 14 (1981).

58. id., and supra note 22, with accompanying text.

59. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 77 (1st Cir. 1986).

found that notice is a jurisdictional prerequisite and four have held that notice is merely procedural."[60]

CONTINUING VIOLATIONS

A pre-Gwaltney case held that citizen suits for wholly past violations of the CAA were allowable,[61] but it is likely that this issue will be decided differently in the future as a result of the Supreme Court's decision in Gwaltney.[62]

Congressional amendments to RCRA[63] and the subject matter of CERCLA make allegations of continuing violations irrelevant to these statutes.

CLEAN AIR ACT

There are several reasons for the fact that there are far fewer citizen suits brought under the Clean Air Act than the Clean Water Act.

While the polluter is required to keep records of his own discharges under the CWA, no such requirement exists under the CAA. Monitoring air pollution requires sophisticated equipment and experts to operate it, both of which are quite expensive. Consequently, few individuals or even environmental groups would be able to bear the expense that proving a violation would impose

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60. Hallstrom v. Tillamook County, 831 F.2d 889, 90 (9th Cir. 1988).

61. Alabama ex rel. Graddick v. Veterans Administration, 648 F. Supp. 1208 (M.D. Ala. 1986).

62. supra note 27, and accompanying text.

63. 42 U.S.C. § 6972(a)(1)(B), allowing suits against persons whose "past or present" actions "may present an imminent and substantial endangerment to health or the environment."

upon them. Public interest law firms, while sometimes willing to put off being paid for their services for a fair amount of time,[64] would not likely be interested in advancing the amount of money necessary for this type of action (especially when it is not nearly as clear that these expenses would be recoverable from the defendant).

Many citizen suits under the CAA have been directed at EPA - prodding them to keep up with Congress' schedules for setting standards, or urging that the standards should be tougher than EPA intends to.[65]

Citizens can bring actions against polluters to compel them to keep up with schedules of compliance as described in the applicable State Implementation Plan (SIP),[66] and can enforce other elements of the SIP, even if the state standards are more stringent than required by federal law.[67]

Apparently, most businesses which put out enough air pollution to evoke the wrath of their neighbors are too big to fit our definition of a small business.

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64. supra note 51, and accompanying text.

65. E.g., Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), aff'd per curiam without opinion (D.C. Cir. 1972), aff'd by an equally divided Court, 412 U.S. 541 (1973), Natural Resources Defense Council, Inc. v. EPA, 655 F.2d 318 (D.C. Cir. 1981).

66. Hancock v. Train, 426 U.S. 167 (1976).

67. Union Electric Co. v. Environmental Protection Agency, 427 U.S. 246, 262-65 (1976).

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Since the citizen suit provisions of CERCLA were only added in 1986, not much has been done with them.[68] However, even before the amendments, a party could sue to recover his response costs if he had indeed incurred costs in cleaning up a waste site.[69] Spending money in such an effort would easily confer standing on the plaintiff.

By now it is beyond reasonable dispute that CERCLA may be applied retroactively,[70] so the "continuing violations" problem which has rescued some defendants in CWA suits is simply not available here.

The "diligent prosecution" bar is not likely to be of much significance here, either. When Congress amended the Act in 1986, rather than just copy the wording from other statutes as had been done in the past, they said that a citizen suit cannot be brought if an action is being diligently prosecuted, but the statute does not require that the prosecution be in a court.[71]

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68. No true citizen suits were found, although the provision has been dragged into a couple of cases. Cabot Corp. v. United States Environmental Protection Agency, 677 F. Supp. 823, 28 (E.D. Pa. 1988), Thompson v. Thomas, 680 F. Supp. 1, 3 (D.D.C. 1987).

69. Fishel v. Westinghouse Electric Corp., 617 F. Supp. 1531 (D.C. Pa. 1985).

70. United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986), United States v. Ward, 618 F. Supp. 884 (D.C.N.C. 1985), United States v. Shell Oil Co., 605 F. Supp. 1064 (D.C. Colo. 1985).

71. 42 U.S.C. § 9659(d)(2).

Whether or not this was intentional, it took away the language relied on by courts to allow citizen suits to go forward after the completion of administrative actions.

As a practical matter, since this statute deals with past problems, and a settlement agreement with the government normally results in provisions being made for the cleanup of the problem, little purpose would be served by bringing a citizen suit in such a case. (The costs incurred in a satisfactory cleanup should be enough punishment to satisfy even the most vindictive of plaintiffs.) Of course, a settlement or even court action is no bar to a suit for personal injuries.

RESOURCE CONSERVATION AND RECOVERY ACT

Defendants have a much better argument for strict interpretation of the notice requirement in RCRA actions than in the others discussed. Congress specifically eliminated the notice requirement for actions involving hazardous wastes, which is a strong indication that they knew the requirement was there and intended it to remain there for other types of actions.

There have not been enough suits brought to determine exactly what will be required to show an "imminent and substantial endangerment to health or the environment," which is the threshhold test for citizen suits.[72]

COMMON LAW ACTIONS

Even though the federal common law is dead where comprehen-

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[72]. 42 U.S.C. § 6971(a)(1)(B).

sive federal statutes have preempted it,[73] state common law actions are still available.[74] There has been some speculation that state actions may also be preempted in those states which have adopted their own environmental legislation.[75] However,

> [i]n state legal systems, common law has long coexisted with complex statutory and regulatory structures, with common law providing individual redress and regulatory structures providing for the public welfare. In fact, full compliance with the state pollution requirements is no defense to a common law suit for damages from the regulated pollution.[76]

There are several theories under which plaintiffs may bring actions when they have been harmed as a result of environmental damage. Common law tort theories have historically included nuisance, trespass, negligence, and strict liability. Some state statutes give additional and/or alternative theories. Rarely does a plaintiff sue under a single cause of action, but by far the most popular of the common law actions has been nuisance.[77]

TYPES OF ACTIONABLE HARMS

In addition to the traditional cases such as contamination

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73. Milwaukee v. Illinois, 451 U.S. 304 (1981).

74. International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987).

75. Miller, supra note 5, at 10323.

76. id. at 10323, n.141.

77. Distinctions may be made between public and private nuisances, and between permanent and continuous nuisances, but such distinctions are not important to this work.

of drinking water supplies[78] and air pollution,[79] modern courts have endeavored to protect other forms of natural resources.

A Pennsylvania state court held that a mining company which disrupted the natural flow of underground springs by its strip mining operations was guilty of committing a nuisance for so doing.[80]

An Ohio court found a city liable for the destruction of wildlife caused by sewage it allowed to be discharged into a river.[81]

Courts have attempted to make several refinements to the law of nuisance. In a case involving an oil spill, the federal court for the district of Maryland said that "one act does not create a nuisance, and that a nuisance necessarily involve[s] the idea of continuance."[82] We may not know the precise number of oil spills

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78. Miller v. Cudahy, 656 F. Supp. 316 (D. Kan. 1987), Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303 (W.D. Tenn. 1986), Commonwealth v. PBS Coals, 112 Pa. Commw. 1, 534 A.2d 1130 (1987), State v. Monarch Chemicals, Inc., 456 N.Y.S.2d 867 (N.Y. App. Div. 1982), Wood v. Picillo, 443 A.2d 1244 (R.I. 1982).

79. Borland v. Sanders Lead, 369 So. 2d 523 (Ala. 1979), Galaxy Carpet Mills, Inc. v. Massengill, 255 Ga. 360, 338 S.E.2d 428 (1986), Nevada Cement Co. v. Lemler, 89 Nev. 447, 514 P.2d 1180 (1973).

80. Commonwealth v. PBS Coals, Inc., 112 Pa. Commw. at 1.

81. State v. City of Bowling Green, 3 Envtl. L. Rep. (Envtl. L. Inst.) 20159 (Ct. App. Wood Cty. Ohio Dec. 22, 1972). (A pending case in Idaho presents the same issue as a result of fish killed by drainage of mine tailings into a stream, Idaho v. Hanna Mining Co., [18 Cases] Envtl. L. Rep. (Envtl. L. Inst.) 20360 (D. Idaho Dec. 23, 1987).

82. Maryland v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972).

required to constitute a nuisance, but the federal district court in Vermont felt that nine in five years was plenty, so they required a shipping company to take safety precautions designed to improve their record.[83]

While some states have statutes forbidding "negligently creating a public nuisance",[84] Rhode Island just recently removed negligence as a requirement of their common law nuisance cause of action.[85] A 1934 case had held that the "defendant could with impunity contaminate the plaintiff's drinking water if the defendant polluted non-negligently",[86] but in 1982 the state supreme court ruled that things had changed, and negligence would no longer be required in groundwater pollution cases.[87]

While not involving physical harm to the environment, offenses to the senses have been held to constitute nuisances, as in the case of noise[88] and unpleasant odors.[89] Unsightliness,

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83. U.S. v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D. Vt. 1973), aff'd, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974) (violations of the FWPCA were also involved).

84. Town of East Troy v. Soo Line Railroad Co., 653 F.2d 1123 (7th Cir. 1980) (Illinois statute).

85. Wood v. Picillo, 443 A.2d 1244 (R.I. 1982).

86. Rose v. Socony-Vacuum Corp., 54 R.I. 411, 173 A. 627 (1934).

87. Wood v. Picillo, 443 A.2d at 1244.

88. E.H. Wilson v. Interlake Steel Co., 185 Cal. Rptr. 280 (1982) (the court said that noise alone was not enough to constitute a trespass, but may be a nuisance).

89. Town of Orangetown v. Gorsuch, 718 F.2d 29 (2d Cir. 1983) (although the defendant won because the plaintiff failed to prove that the sewage treatment plant next to the defendant's

even if it diminishes the value of the plaintiff's property, is not actionable without some other type of injury.[90]

Although economic harm alone is not enough to constitute a nuisance,[91] the absence of economic harm will not cause a plaintiff to lose.[92]

Compliance with applicable state or federal statutes is usually held to not be a defense to a nuisance claim.[93] In the famous case of Spur Industries Inc. v. Del. E. Webb Development Co., a once proper business (cattle feedlot) was held to constitute a nuisance due to changed circumstances (residential

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sewage treatment plant was not causing the problem), Hobbs v. Smith, 2 Envtl. L. Rep. (Envtl. L. Inst.) 20380 (Colo. Feb. 28, 1972) (horses in residential area), Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 179, 494 P.2d 700 (1972) (cattle feedlot).

90. Lillson v. Barton, 229 S.E.2d 476 (Ga. Ct. App. 1976).

91. Louisiana ex rel Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, sub nom White v. M/V Testbank, 106 S. Ct. 3271 (1986) (and cases cited therein).

92. In Borland v. Sanders Lead, 369 So. 2d 523 (Ala. 1979) the plaintiff's property had actually increased in value due to the commercial activities of Sanders.

93. Galaxy Carpet Mills, Inc. v. Massengill, 255 Ga. 360, 338 S.E.2d 428 (1986), Village of Wilsonville v. SCA Servs., Inc., 86 Ill. 2d 1, 426 N.E.2d 824 (1981), Borland v. Sanders Lead, 369 So.2d at 523, Hobbs v. Smith, 2 Envtl. L. Rep. (Envtl. L. Inst.) at 20380, but see Twitty v. North Carolina, 527 F. Supp. 778 (E.D.N.C. 1981), aff'd, 696 F.2d 992 (4th Cir. 1982) (disposal of PCB's as allowed by statute could not be a nuisance), Town of Hokes Bluff v. Butler, 404 So. 2d 623 (Ala. 1981) (after stating "there can be no abatable nuisance for doing in a proper manner what is authorized by law," court holds that city did not act in a "proper manner" and thus issued an injunction).

development), but the developer had to pay to relocate the feedlot, since he "came to" the nuisance.[94]

REMEDIES AVAILABLE

Courts typically award a prevailing plaintiff an injunction to prevent further harm or to clean up what has been done,[95] and may also award monetary damages. Damages come in three basic types: general (pain and suffering, aesthetics, etc.), special (past and future out of pocket expenses, reduced property values, etc.), and punitive (having pedagogical value). Attorney fees are normally not awarded in common law actions, but they are specifically authorized by the federal statutes.[96]

NUMBERS

The frequency with which citizen suits are filed is "difficult to assess because case filings and results are not systematically collected and tabulated."[97] An admittedly incomplete check found 46 citizen suits filed during the three years ending in 1979.[98] One attorney I spoke with told me that her firm alone had filed that many since 1983, of which approximately 10 involved what we are considering to be small

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94. 108 Ariz. at 179.

95. Philadelphia Electric Co. v. Hercules, 762 F.2d 303 (3rd Cir. 1985), cert. denied, 106 S. Ct. 384 (1985) (injunction may be proper relief even if not asked for by plaintiff).

96. E.g., 33 U.S.C. 1365(d).

97. Miller, supra note 5, at 10313.

98. id. at n.36, citing U.S. District Court Current Filings.

businesses.[99] A second attorney, with an environmental group, reported sending notice letters in 43 cases at once (in conjunction with another group), with 15 fitting our definition of small business.[100] Between the two batches, only one case was lost (Contract Plating)[101] (which did involve one of the small businesses). Other than one action which was dropped as a result of the Contract Plating decision, all other cases which have been resolved have been victories for the plaintiffs.

A second collection of filings (also incomplete) found 62 citizen suits under the CWA (and 8 under other legislation) during 1983 and 26 (and 3) in 1984.[102] (My guess is that this collection is even more incomplete than the first, since the second seemed to be missing some that were found in the first - although it is impossible to be sure since they used incomparable categories.)

In spite of the uncertainties as to precise numbers, it safe to say that there have been many more citizen suits filed during the last five years than there were during the preceeding five.

EFFECTIVENESS

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99. Telephone interview with Carolyn Travlik, supra note 49.

100. Telephone interview with Kathryn Robinson, supra note 11.

101. 631 F. Supp. at 1291 (the state was already prosecuting).

102. Miller, Private Enforcement of Federal Pollution Control Laws, Part III, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10407, 24 (Nov. 1984) (using figures from Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes, V-25 to 27 (1984).

Citizen suits under the CWA are quite effective in getting pollution stopped. Strict liability for polluters and the ease with which incriminating evidence may be obtained make them relatively easy cases to prosecute and win.

"In practice most companies that are successfully sued by citizens [under the CWA] seem to find a way to come into compliance with these permits. Where there is a will, there is a way. Citizen enforcement helps create the will."[103]

"[The] benefits [of the CWA cases] will not occur under other environmental statutes, however, unless the existing statutes are changed to make private enforcement less difficult. Such a change would help EPA, the states and their citizens."[104]

The fact that citizen suits are used fairly extensively in some areas but not at all in others works against the Congressional intent of having uniform environmental regulations. If a group is doing a good job of forcing polluters to clean up their acts, this can cause prospective or even existing industries to go elsewhere where the resources and the citizenry are not so adequately protected. While this is precisely the evil Congress

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103. Roisman, The Role of the Citizen in Enforcing Environmental Laws, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10163, 64 (July 1986).

104. Terris, supra note 36, at 10256, but see Babich and Hanson, Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizens Organizations, [18 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10165, 74 (they reach the optimistic and rather simplistic conclusion that "citizen suits and actions to recover costs of responding to environmental contamination can be expected to provide affordable and effective remedies to plaintiffs who wish to take advantage of them").

sought to avoid, without uniform enforcement this unfortunate result will undoubtedly continue to occur.

> In any event, citizen enforcement is not a panacea. It cannot replace agency enforcement. Even under the Water Act, where so many cases have been brought, it does not do so. In other areas, citizen enforcement does not even make a dent, because, despite appearances, the statutes are not formulated to permit these suits to be filed.[105]

Nuisance actions can be effective because of the availability of injunctive relief, which can be used to stop further damage and to clean up existing problems.[106]

Citizens' groups would not be effective in using nuisance actions because they would not be able to show the type of individual injury required by the common law.

TRENDS

The recent demise of the federal common law in areas which have been preempted by federal environmental statutes may affect the numbers and/or types of actions brought. It certainly seems to mean that the only opportunity available to plaintiffs in the federal courts is to sue under one or more of the federal statutes (to which other causes of action may, of course, be appended).[107]

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105. Terris, supra note 36, at 10256.

106. But see Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 871, 309 N.Y.S.2d 312 (1970) (Defendant could continue polluting as long as he compensated plaintiff).

107. Federal courts are open to parties of diverse citizenship when the amount in controversy is greater than $10,000, but diversity of citizenship would be unusual in a suit involving a small business.

Under the common law, however, courts have dramatically expanded the list of causes of action available to injured parties. Plaintiffs have recently been awarded compensation for such claims as mental suffering,[108] risk of future disease,[109] future medical expenses,[110] and even cancerphobia.[111] This will likely have the effect of increasing the amounts of damages awarded to prevailing plaintiffs. The fact that Congress recently raised the maximum penalties under the CWA[112] and CERCLA[113] suggests that they are not opposed to hitting polluters hard in the pocketbook.

The ever-increasing costs of disposing of hazardous wastes

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108. Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303 (W.D. Tenn. 1986), Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982).

109. Sterling v. Velsicol, 647 F. Supp. at 303, Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986) (only if future illness is related to presently suffered illness), but cf. Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315 (5th Cir. 1986), rehearing denied en banc, 797 F.2d 256 (5th Cir. 1986) (plaintiff can recover only if defendant's bad act will more probably than not cause cancer).

110. Hagerty v. L & L Marine Servs., Inc., 788 F.2d at 315, Habitants Against Landfill Toxicants v. City of York, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20937 (Pa. Sup. Ct. May 20, 1985) (only if plaintiffs proved the potential for severe and latent injuries and the need for early detection), Askey v. Occidental Chemical Corp., 102 A.D.2d 130, 477 N.Y.S.2d 242 (1984).

111. Sterling v. Velsicol, 647 F. Supp. at 303, Hagerty v. L & L Marine, 788 F.2d at 315 (only if plaintiff shows that he has a greater than 50% chance of getting it).

112. supra note 42, and accompanying text.

113. 42 U.S.C. § 9609.

have also greatly increased the amount of compensation required when hazardous materials are involved.

The fact that approximately half the district and circuit courts have held that the 60-day notice requirement does not have to be strictly complied with may suggest a trend among these courts to encourage, rather than inhibit, citizen involvement in enforcement actions.

However, there may be fewer settlements now, because if the polluter feels that he may be able to comply before a trial could be completed, he may see the Gwaltney case literally as "an invitation to the dance of litigation"[114] and as a disincentive to settlement. But since guessing wrong could be costly, due to the higher litigation costs he must pay if he loses, this may influence some parties back towards the negotiating table.

One very involved attorney, when asked if the relatively long-term financial investment and the delays of the system were discouraging, responded, "What are we going to do? We're going to bring more cases. We know how to go about it now, and we're about to start on the next wave."[115][116]

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114. see Miller, supra note 28.

115. Terris, supra note 36, at 10257.

116. But cf. The few published commentaries on Gwaltney suggest that there will be fewer citizen suits brought as a result of this decision. Miller, supra note 28, at 10104, Powers, A Citizen's View of Gwaltney, [18 News & Analysis] Envtl. L. Rev. (Envtl. L. Inst.) 10119, 21 (Apr. 1988), and DuBoff and Clearwater, Arguing for the Defense After Gwaltney, [18 News & Analysis] Envtl. L. Rev. (Envtl. L. Inst.) 10123, 26 (Apr. 1988).

The next wave is likely to be concentrated on municipally owned treatment works,[117] which were actually the larger part of the problem all along.[118] The success of the first round and the probable success of this one will likely inspire even more suits to be brought, which can only have the affect intended by Congress, which is to clean up the nation's waters.

There is a slim possibility that another recent Supreme Court decision might affect the way some suits are handled. In the CWA case of Tull v. United States,[119] the Court held that the defendant was entitled to a jury trial on the issue of liability (but not damages). This was not a citizen suit, so the holding may not be applicable, but even if it does apply, it should not make much difference. Since the CWA imposes strict liability, which is normally proved by the defendant's own records, it would seem that if a jury were involved, the plaintiff would now just move for directed verdict instead of summary judgment. Since the increased costs involved in jury selection and other related matters would only be passed on to the defendant if the plaintiff prevails, it would not make sense for a defendant to exercise this right unless he were just trying to buy time to get into compliance.

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117. Telephone interview with Kathryn Robinson, supra note 11.

118. 10 CEQ Ann. Rep. 113 (1979) (only 40% of the major municipal dischargers met the 1977 CWA deadlines, compared to about 80% of the major industrial dischargers).

119. 107 S. Ct. 1831 (1987).

The current status of the law is less a product of glacial creeping than quick jumps made as the Supreme Court interprets the law. The litigation that has occurred to date is sufficient to highlight potential trouble spots for plaintiffs, and while Gwaltney may cause some temporary confusion as to some issues, the main path is well marked and relatively free of major obstacles.

In any event, the trend is clearly towards granting judgment for even minimal violations to plaintiffs with even minimal standing.

RAMIFICATIONS

In those states where an environmental/citizens' group is actively pursuing violators of the CWA, state and federal regulatory agencies can perhaps relax a bit and let them take a share of the work load. In most areas, however, such is not the case. Even where such groups are organized and active, they have only been successful in enforcing violations of the CWA.

Rather than just idly watching, though, it is in the interest of EPA to monitor citizen suits to make sure good cases do not get mishandled. This can even require EPA to do work it hadn't anticipated, such as filing amicus briefs, because "[w]hile EPA's position usually has been the same as that of the environmentalists, EPA tries to avoid the risk that the court will decide against environmental enforcement without realizing that is is thereby hurting the EPA."[120] In addition, in the 1987

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120. Terris, supra note 36, at 10256.